

HOUSE No. 4229

The Commonwealth of Massachusetts

By Mr. Walsh of Lynn, for the committee on State Administration and Regulatory Oversight, on House, No. 3053, a Bill promoting fair contract provisions (House, No. 4229).
September 10, 2009.

AN ACT TO PROMOTE FAIR CONTRACT PROVISIONS.

FOR THE COMMITTEE:

NAME:	DISTRICT/ADDRESS:
Steven M. Walsh	11th Essex

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT TO PROMOTE FAIR CONTRACT PROVISIONS.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith for payment to contractors regardless of receipt of payments from third persons, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 149 of the General Laws, as appearing in the 2008 Official Edition,
2 is hereby amended by inserting after section 29D the following section:—
3 Section 29E. (a) As used in this section the following words shall have the following meanings:
4 “Construction Services”, all labor, materials or services, including specially fabricated materials,
5 rental equipment, appliances, tools and transportation charges, and all claims related thereto used
6 or employed, or to be used or employed, in the construction, reconstruction, alteration, erection,
7 remodeling, repair, demolition or removal of a building, structure, or other improvement to real
8 property, whether public or private.
9 “Person”, individuals, corporations, organizations, trusts, associations, partnerships, companies
10 and public agencies.

11 “Insolvency”, as defined under federal bankruptcy law.

12 “Commencement of Performance”, forthwith after first performing, and in any event before
13 receiving any payment.

14 “All reasonable legal remedies”, taking such legal action as is necessary to obtain payment
15 unless and until there is a reasonable likelihood such action will not result in obtaining payment.

16 (b) Any provision in a contract for or relating to construction services that makes payment to
17 person furnishing the construction services conditional upon receipt of payment from a third
18 person, is against public policy and is void and unenforceable, except to the extent that amounts
19 are not received from such third person because (1) the person furnishing the construction
20 services failed to perform under its contract and failed to cure such non-performance after receipt
21 of notice as provided in such contract; or (2) the third person is insolvent, provided that the
22 person seeking to assert the payment condition has claimed a lien under chapter 254 of the
23 General Laws upon commencement of his performance, maintained and perfected such lien, and
24 pursued all reasonable legal remedies to obtain payment. The foregoing exceptions must be
25 expressly stated in any such contract provision, and the person seeking to assert the payment
26 condition shall have the burden of proof as to each element. Nothing in this section or in any
27 such provision shall be valid as a defense to enforcement of a lien claimed under said chapter
28 254 by the person furnishing the construction services.

29 Any party aggrieved by the failure of the party seeking to assert the payment condition to pursue
30 all reasonable legal remedies to obtain payment may avail itself of the summary procedure set
31 forth in section 15A of said chapter 254 for a determination of whether all reasonable legal
32 remedies have been fulfilled with respect to the particular lien claim at issue.

33 Nothing contained in this section shall be construed to in any way amend any law governing

- 34 payments on public construction projects, or to impose on a public agency any payment
- 35 obligation beyond that imposed by law.